

STATE OF MICHIGAN
IN THE SUPREME COURT

(On Application for Leave to Appeal from the Court of Appeals, Bandstra, P.J. Fitzgerald and Sawyer, J.J.)

KENNETH R. DEYO,

Plaintiff/Appellant,

vs.

Supreme Court No.: 126795

Court of Appeals No.: 245210

LC No: 01-30982-DM

VICKI E. DEYO,

Defendant/Appellee.

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**DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF IN RESPONSE TO PLAINTIFF-
APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

FILED

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COURT RULES

None.

STATEMENT OF BASIS OF JURISDICTION

The Defendant/Appellee agrees with the Statement of Basis of Jurisdiction set forth by the Plaintiff/Appellant.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Trial Court properly award Defendant/Appellee a portion of Plaintiff/Appellant's inheritance from his father finding that the inherited property was not treated by the parties as separate property and also finding that the Defendant/Appellee contributed to the acquisition of the inherited property?

Plaintiff/Appellant would say no.

Trial Court would say yes.

Defendant/Appellee would say yes.

2. Does the trial court record justify for other reasons the trial court's award to Defendant/Appellee a portion of Plaintiff/Appellant's inheritance from his father?

Plaintiff/Appellant would say no.

Trial Court would say yes.

Defendant/Appellee would say yes.

SUPPLEMENTAL STATEMENT OF FACTS

BRIEF HISTORY.

Plaintiff / Appellate, Kenneth Deyo (hereinafter "Plaintiff"), and Defendant / Appellee, Vicki Deyo (hereinafter "Defendant") were married on July 27, 1977 making this a marriage of twenty-five years. At the time of trial, Plaintiff was 47 years of age and the Defendant 44 years of age. There were two children borne of this marriage. At the start of trial, those children, Jeannette K. Deyo, and Christine M. Deyo, were 21 and 17 years of age, respectively.

Plaintiff testified that the two separated on the day he filed his complaint for divorce. See August 27, 2002 transcript, page 69, lines 19 and 20.

Through most of the marriage, Defendant was a stay-at-home parent. Very early in the marriage Defendant was employed at a bank but quit when she gave birth to her first child. During the marriage Defendant did work as a lunchroom aide making less than \$1,000.00 per year in the few years she did so. There was no testimony at trial indicating that Defendant currently had any marketable skills that would provide her an opportunity to work at a decent wage in the workforce.

Plaintiff, during most of the marriage, was employed with Holy Sepulchre Cemetery. Plaintiff and Defendant agreed at trial that Defendant's employment was the source of the marital income. For the few years before he left his employment at the cemetery Plaintiff earned approximately \$25,000.00 per year. His employment benefits included a pension. (August 27, 2002 transcript, page 71, lines 13-15).

The parties had a very frugal life style. Defendant testified that most of the furnishings for the house were purchased at garage sales. (September 4, 2002 transcript, page 161, lines 10-21). Defendant testified that she purchased her clothing at re-sale shops. (September 4, 2002

transcript page 162, line 2). The children were purchased new clothing, however. (September 4, 2002 transcript, page 161, lines 23-25). This lifestyle lasted the entire marriage. Plaintiff's claim that Defendant was a big spender was simply not true and certainly not supported with any evidence.

Both Plaintiff and Defendant inherited substantial sums of money during the marriage. Early in the marriage, Defendant testified that she inherited approximately \$100,000.00 upon the passing of her parents. The inheritance was commingled with family assets and used to buy the marital home and other assets. (See September 4, 2002 transcript, pages 62 and 63). That sum of money was needed as Plaintiff had a meager income and Defendant worked raising the family. As Defendant testified, she considered everything marital. She took things in as a marriage. (September 4, 2002 transcript, page 62, lines 4-8).

Plaintiff inherited his father's estate in 1997. His father's gross estate was valued at more than \$3.6 million. Plaintiff received substantially less than that after taxes and administrative expenses were paid. Nonetheless, it was a large inheritance. It is this inheritance, distributed by the trial judge, which is a major issue in this application of leave to appeal.

PRESERVATION OF THE INHERITED ESTATE

Plaintiff's father died in 1997. For several years before Plaintiff's father died, his father needed substantial assistance and care due to his poor physical health and declining mental health. (August 27, 2002 transcript, page 73, lines 3-5). Both parties agreed that the other helped in the care of Plaintiff's father although each disputed the extent of the others assistance. (See August 27, 2002 transcript, page 742, lines 10-13 where Plaintiff admits that Defendant helped care for his father, but attempts to minimize her help).

Plaintiff also testified that he quit his job at the Cemetery to take care of his father. (August 27, 2002 transcript, page 71, lines 7-8). As a result of leaving his job at the cemetery the parties lost that paycheck and retirement benefits were frozen. (August 27, 2002 transcript, page 72, lines 18-23). Plaintiff was appointed guardian and conservator of his father by the Oakland County Probate Court. With the authority he had as conservator Plaintiff paid himself from his father's assets. (August 27, 2002 transcript, page 78, lines 16-18). This became part of the marital income. So even before Plaintiff's father passed away, Plaintiff was treating his father's assets as his own and blending the assets with his marital assets.

Plaintiff elected to care for his father at his home because it was more economical to care for his father at his home rather than placing him in a nursing home. (August 27, 2002 transcript, page 80, lines 1-4). In other words, Plaintiff knew that by leaving his job at the cemetery and caring for his father, rather than placing his father in a nursing home, he would inherit a greater amount from his father than he would lose by leaving his job.

Defendant cared for Plaintiff's father putting up with his ornery nature. Even Plaintiff admitted that his father was a very difficult person to deal with, especially for women. An unbiased neighbor, Debbie Mathes, testified that in fact Defendant cared for Plaintiff's father at his residence and provided three meals per day on a consistent regular basis for a period of approximately three years. (September 5, 2002 transcript, pages 69 – 72, page 74). To add credibility to her testimony, Ms. Mathes indicated that Plaintiff's father and Defendant had a "rocky relationship"; however, Defendant provided this nurturing care regardless.

Defendant also testified at great length about her care for her father-in-law. (September 4, 2002 transcript, page 131 and pages 133).

The trial court found that Defendant also cared for Plaintiff's father. So it was a joint effort in preserving Plaintiff's father's estate which would become Plaintiff's inheritance.

The trial court concluded that it was Defendants kindness and effort towards Plaintiff's father that helped pave the way for the large inheritance. There was no other explanation offered for the inheritance.

The parties contemplated for years what they would do if they inherited Plaintiff's father's estate. Plaintiff and Defendant spoke with their children about vacations and other plans if they did inherit the estate. (September 4, 2002 transcript, page 64, lines 3-9). After all, the Deyo family lived a very frugal lifestyle based upon the meager income generated by Plaintiff. They dreamed of the nice things in life that they could not enjoy with their current income.

Even during that last several years of the marriage, when the marriage deteriorated, the talk was still that the inheritance was to be marital property. (September 4, 2002 transcript, page 64, line 22-25, and page 65, line 1).

But when the inheritance came, Plaintiff changed his tune. Up to that point, everything was "theirs". Now, it was mine (Plaintiff's). (September 4, 2002 transcript, page 64, lines 10-12).

THE INHERITED ESTATE.

His father's gross estate amounted to approximately \$3,628,000.00, according to the Estate's Federal 706 form filing. (See August 27, 2002 transcript, page 28, lines 21 and 22). Of that amount, \$1,460,000.00 was held as real estate, \$2,073,00 in stocks and bonds, \$16,000.00 in cash and \$79,000.00 in miscellaneous property. (See Tr1, page 29, lines 9 – 13). The value of the real estate was set pursuant to stipulation of the parties or through uncontested evidence of an expert.

Tim White, from Ferris, Baker, Watts Brokerage, testified that Plaintiff's father, at the time of his passing, held approximately 1.5 million worth in stocks and bonds. However, out of that \$450,000.00 went to pay estate taxes. By trial the asset had dwindled down to \$448,000.00 net after taking into account a \$330,000.00 margin. Plaintiff admitted at trial that he had paid the margin calls and attempted to account for the same. However, upon attempting to account for the sums of money, Plaintiff was unable to account for \$57,382.00, which he claimed were payments against the margin. (See September 3, 2002 transcript, page 70). One can only conclude that the Plaintiff was attempting to hide money that he obtained.

Included in the inherited estate was farm land with two houses and an oil well, property in Warren, Michigan and Steinacker property already listed.

The inherited assets not kept separate

The Trial Court found that Defendant's inherited assets were "blended" into the marital estate. Plaintiff testified that when his father was ill, Plaintiff purchased a home at 3814 Steinacker using his father's assets (he margined his father's portfolio account. (See August 27, 2002 transcript, page 83, lines 22 - 24). Plaintiff moved his father and his family into that house. (See August 27, 2002 transcript, page 85, lines 3 and 6). A year and a half after his father passed away, Plaintiff recorded a deed to the house transferring it to himself and the Defendant. After his father passed away, Plaintiff purchased 3802 Steinacker using inherited funds. (See August 28, 2002 transcript, page 27, lines 8 and 9). The house was titled in Plaintiff's and Defendant's name. (See August 28, 2002 transcript, page 22, lines 22 - 25). They rented that house out together. (See August 28, 2002 transcript, page 19, lines 11 and 17). After his fathers death, Plaintiff used his inherited funds to remodel 3814 Steinacker (the new family home). (See August 28, 2002 transcript, page 35, lines 8-25 and page 36, lines 1-8). Plaintiff used inherited

funds to install central air at 3814 Steinacker. (See August 28, 2002 transcript, page 39, lines 1 - 19).

The blending reached far beyond purchasing and improving their homes. Plaintiff used inherited funds to purchase fertilizer and a power washer (See August 28, 2002 transcript, page 39, lines 1 - 19), paid joint credit card debts (See August 28, 2002 transcript, page 37, lines 11 - 15), purchased a truck and lawn maintenance equipment he planned to use in a new business to support his family, and purchased his daughter a car (See August 28, 2002 transcript, page 40).

Inherited funds generated income that was included in the joint tax returns and marital funds were used to pay tax debts. (The 1997 – 2000 joint tax returns were admitted into evidence August 27, 2002. See that transcript, page 24). Filing the returns jointly increased Defendant's liability. Even real estate taxes were paid from Plaintiff's inherited funds. (See August 28, 2002 transcript, page 37, lines 3-4).

Clearly, Plaintiff treated the inherited assets and the income from those assets as marital property.

DEFENDANT CONTRIBUTES TO THE IMPROVEMENT OF THE INHERITED ASSETS.

After Plaintiff inherited his father's estate, Plaintiff managed those assets. As the trial record indicates, Plaintiff never really returned to gainful employment after leaving the cemetery job. And as the trial record indicates, Defendant continued to maintain the family home freeing her husband to manage those inherited assets.

PLAINTIFF AT FAULT FOR MARRIAGE BREAKDOWN.

The trial court did find Plaintiff at fault for the breakdown of the marriage. The fault was in the form of physical violence and extra-marital affairs. The Trial Court also noted Plaintiff's poor conduct during the course of the divorce action itself.

Plaintiff denied at trial that he had an extra-marital relationship. (September 3, 2002 transcript, pages 26 and 27). Plaintiff's testimony was that this other woman, Christine Angelosanto, was just a good friend. Plaintiff fails, however, in his brief, to indicate that he admitted at trial to telling other persons that he had a sexual relationship with another women. (September 3, 2002 transcript, page 26, lines 11-13). Defendant offered as evidence pictures of Plaintiff dancing with this other woman. (September 3, 2002 transcript, page 37, line 12). It so happens that this occurred in the presence of the minor children. Apparently, Plaintiff had his children when he was with this other woman on other occasions as well. (September 5, 2002 transcript, page 67, lines 13-14). Defendant also produced a jewelry receipt (September 5, 2002 transcript, page 69 and 70) which could not be explained by Plaintiff.

The other woman also testified. She denied any improper relationship. When confronted with a "love letter" she sent to the Plaintiff, she indicated that she "loves" all of her friends. (September 5, 2002 transcript, page 54, lines 1-6 and page 55, lines 2-8). Then, the witness was asked to read one of her letters to Plaintiff into the record. (September 5, 2002 transcript, page 55, beginning at line 20). The letter can only be identified as a "love letter." Nonetheless, the Plaintiff and his lover tried to convince the judge that they were only "good friends."

Further, Plaintiff generally denied physical abuse. He did make somewhat of an admission of it at trial. (September 5, 2002 transcript, page 119). There was testimony to establish the violence from both the Defendant and Ms. Mathes. (September 5, 2002 transcript,

page 113, lines 8-12). There was also photographic evidence of Defendant's facial bruising following a beating at the hands of Plaintiff. (Defendant's Exhibits 6A-D, September 5, 2002 transcript, page 116, line 18 and September 5, 2002 transcript, page 78, lines 20-25).

Despite this abuse and extra-marital affair, the Defendant did stay married to the Plaintiff. She endured for the sake of the children. Divorce was not an option for the Defendant. (September 4, 2002 transcript, page 71, lines 5-25).

Plaintiff also complained to the Court that Defendant had poisoned any relationship that he might have with either of the children. This was not supported at trial. Dr. Richard Zipper, Again, Plaintiff's testimony cannot be believed in that Dr. Richard Zipper testified there was absolutely no evidence of parental alienation on behalf of the Defendant. In fact, Dr. Zipper testified that the Defendant "did bias Christine in favor of her father...". (September 4, 2002 transcript, page 84, lines 6-9). It is clear that the Defendant attempted to paint an unrealistically pleasant portrayal of the Plaintiff to the children to protect them from the fact of what a true scoundrel he really was. Dr. Zipper testified subsequent that when the children learned what a scoundrel Plaintiff was, it was even a bigger disappointment in that the Defendant had inflated his attributes beyond reality to the children. (See September 4, 2002 transcript, page 84, lines 11-21).

Further, it should be noted that Plaintiff blames the Defendant for putting the minor child, Christine, on birth control, even alleging that his own daughter was sleeping around. When the truth of the matter as testified to by Dr. Zipper, it was un-refuted that the child was put on birth control as part of her mental health to level out her hormones. (September 4, 2002 transcript, page 87, lines 2-23). Plaintiff would rather impugn his child's morality than check into the matter to find out that it was really a medically induced decision to put her on birth control.

Plaintiff's pre-trial conduct in obeying Court orders was made an issue at trial. Plaintiff's testimony at trial supported a finding that he was simply able to say anything he wished with no concern for the truth. Plaintiff seems to argue in his brief that he did follow the specific orders requiring him to pay certain bills and expenses during the course of the litigation. The evidence and admissions do not support Plaintiff. At trial the following documents were introduced into evidence:

- 1) Status Quo Order
- 2) Petition for an Order to Show Cause for Failure to Comply with Status Quo Order heard on September 27, 2001.
- 3) Consent Order for Status Quo dated February 14, 2002.
- 4) Correspondence to Plaintiff's counsel dated January 7, 2002 regarding cancelled checks and receipts pertaining to reimbursement for the minor child's school related activities and Defendant's counseling sessions totaling \$5,036.92.
- 5) Correspondence to Plaintiff's counsel with receipts for reimbursement to Defendant dated May 10, 2002 totaling \$4,676.97.
- 6) Correspondence to Plaintiff's counsel with receipts for reimbursement to Defendant dated August 16, 2002 totaling \$8,383.70.

Contrary to the Court orders, Plaintiff reduced the Defendant's phone service (September 3, 2002 transcript, page 83, lines 11-13), paid the car warranty bill only after petitioned to Court for failure to do so (September 3, 2002 transcript, page 84, lines 4-6), failed to pay the satellite TV service and it was interrupted (September 3, 2002 transcript, page 87, 21-22), permitted to lapse car insurance on vehicle used by daughter (September 3, 2002 transcript, page 91, lines 21 and 22), late on payments to Defendant (September 3, 2002 transcript, page 93, lines 122-125),

and failed to pay for one minor child's legitimate school expenses. Plaintiff also admits to failing to comply with orders to pay at September 3, 2002 transcript, page 94, line 22 and September 3, 2002 transcript, page 97, line 2 and 3. Plaintiff, in review of the two letters identified above, failed to pay approximately \$19,215.77 in money that he was required to pay.

THE TRIAL COURT RULING.

The Trial Court made its findings in a written Opinion dated October 4, 2002. It is clear from that Opinion that the Trial Court did not find much credibility in Plaintiff's testimony. In fact, the Trial Court expressed its dissatisfaction with Plaintiff believing that he was simply testifying untruthfully. The Trial Court divided the assets, awarded Defendant alimony, awarded her physical custody of the minor children and child support.

The Trial Court did award the Defendant/Appellee a portion of Plaintiff/Appellant's inherited property. The Trial Court, at Page 5 of its Opinion, justified its decision by stating "This court believes that the wife's assistance in caring for the father [the source of the inherited property] as well as her continuation in the strained marriage for so many years, created a situation whereby she did contribute to the inherited estate." The trial court also found that the inherited assets were "blended" into the marital estate.

The Trial Court then went on to provide an alternate justification for the invasion of the inherited property with an analysis of the appropriate case law.

It is clear from the appeal that Plaintiff is challenging only the property award. Of the more than \$3,000,000.00 in property at issue, Plaintiff received just under \$2,000,000.00 and the Defendant received just over \$1,000,000.00.

ARGUMENT

1. THE TRIAL COURT PROPERLY DIVIDED THE INHERITED ESTATE FINDING THAT IT WAS NOT TREATED AS SEPARATE PROPERTY BY THE PARTIES.

Defendant agrees with the standard of review set forth by Plaintiff.

The first consideration in a divorce proceeding is to define the marital estate. *Reeves v Reeves*, 226 Mich App 490, 575 NW2d 1 (1997). The marital estate is generally defined as property accrued during the marriage that is not inherited and/or gifted. “[W]hether to include an inheritance in the valuation of the marital assets is discretionary and is dependent upon the particular circumstances of a given case”. *Wilson v Wilson*, 2001 WL 633676 Mich App., June 1, 2001; *Demman v Demman*, 195 Mich App 109; 112; 489 NW2d 161 (1992).

As a general rule, the Court has discretion to treat property inherited during the marriage as either marital or separate property. In order to determine whether inherited property is to be treated as marital property, the Court must look to several factors including the following: 1) the length of the marriage, 2) how the parties handled the property, and 3) how the property was titled. The parties in this case have been married for 25 years. The longer the marriage, the more likely the Courts have been to consider the property as part of the marital estate. *Charlton v Charlton*, 397 Mich 84; 243 NW2d 261 (1976).

The Court of Appeals did not focus on the findings of the Trial Court that the inherited estate was "blended" into the marital estate and not kept separate. The parties treated the inherited estate as marital property. Plaintiff even went so far as to title inherited real estate in both his and Defendant's name. Income from inherited property was used as marital income.

Both Plaintiff and Defendant made purchases using income from inherited assets to pay. The parties reported capital gains and income from the inherited estate on joint tax returns.

The parties speculated whether they would receive the inheritance and dreamed of the better life style should they receive the inheritance. It is clear that even before they received the inheritance the parties contemplated treating the inheritance as marital property.

The Trial Court properly found that the inherited estate was not kept separate and could be treated as part of the marital estate.

2. THE TRIAL COURT PROPERLY AWARDED DEFENDANT A PORTION OF THE INHERITED ESTATE FINDING THAT DEFENDANT CONTRIBUTED TO THE ACQUISITION, IMPROVEMENT OR ACCUMULATION OF THE INHERITED PROPERTY.

Inherited property may be invaded even if it is kept separate.

MCL 352.401 provides that inherited property may be awarded to the other spouse if the spouse contributed to the acquisition, improvement, or accumulation of the separate property.

The Trial Court found that Defendant contributed to the acquisition of the property by caring for Plaintiff's father during his declining years. She provided such care when her marriage was declining and when her father in law was a less than congenial patient. Her kindness and caring motivated Plaintiff's father and the gift was made to his son.

Plaintiff offered no explanation to the contrary for his father's action.

Although there was ample evidence in support, the Trial Court did not rule whether Defendant contributed to the improvement or accumulation of the separate property. The Trial Court's award can be justified for those reasons.

The evidence demonstrated that that Plaintiff realized that it was more economical to care for his father than placing him in a nursing home. Defendant contributed to this improvement or accumulation of the inherited estate both directly and indirectly. The Trial Court specifically found that Defendant provided intensive and time consuming care for her father in law. Defendant was not paid for her services. Defendant's actions helped preserve the inherited estate because the alternative was to place Plaintiff's father in a nursing home. Her actions directly impacted the size of the inheritance. Further, Defendant maintained the family house hold freeing Plaintiff's time to care for his father and preserve the inherited estate.

These facts concepts are similar to those in *Hanaway v. Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995) where one spouse contributed to the improvement of the inherited stock by maintaining the marital home so that her husband to work long hours at the corporation to build its value, which was reflected in the value of the stock.

Even after Plaintiff inherited his father's estate, Defendant helped free Plaintiff's time to manage, and therefore improve, the inherited assets. As the trial transcript reveals, Plaintiff left his gainful employment before his father's death and did not seek full time employment after his father's death. His full time job, so to say, was the management of the inherited estate which would not been possible but for Defendant's commitment to maintain the family household on her own.

Additionally, one cannot forget the length of marriage of the parties. *Charlton* requires that the length of the marriage is an issue. This marriage was 25 years. The Trial Court properly considered this a long term marriage justifying the invasion of the marital estate.

3. THE TRIAL COURT APPLIED THE CORRECT LAW WHEN DIVIDING THE PROPERTY OF THE PARTIES, INCLUDING THE INHERITED ESTATE.

The list of factors to determine the division of property includes, but is not limited to, the following: 1) duration of the marriage, 2) the contribution of the parties, 3) the age of the parties, 4) health of the parties, 5) the life status of the parties, 6) necessities and circumstances of the parties, 7) earning ability of the parties, 8) the past relations and conduct of the parties, 9) the interruption of personal career or education of either party during the marriage and 10) general principles of equity. *Sparks v Sparks*, 440 Mich 141, 485 NW2d 893 (1992).

The Trial Court reviewed these factors and the evidence. The Defendant remained faithful to her vows and committed everything she had to the marriage. She sacrificed her career opportunities to see to the care of the Plaintiff and their children. Her husband rewarded her with unfaithfulness. She suffered unnecessarily at the Plaintiff's hands both physically and emotionally. Plaintiff's continued affair and his treatment of her during the marriage caused her emotional trauma and stress for which she is seeking treatment. While most people leave their marriage with their fair share of emotional scars, it was cruel of Plaintiff to continue to string the Defendant along through several marriage counselors and failing to take responsibility for his actions in this marriage.

The Defendant had a financially comfortable lifestyle and the same should continue beyond this divorce. Without the award she received, she would be destitute. She had no marketable work skills that would permit her to continue her lifestyle. Neither party should have to suffer unnecessary hardship.

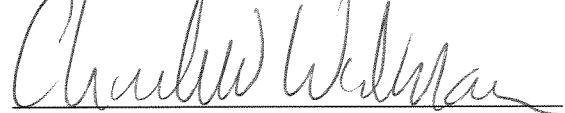
RELIEF REQUESTED

Defendant requests that this Court deny leave to appeal, or, in the alternative, affirm both the Court of Appeal's decision and the Trial Court's ruling.

Respectfully Submitted,

HARRIS & LITERSKI

Attorneys for Defendant/Appellee

A handwritten signature in cursive script, appearing to read "Charles W. Widmaier", written over a horizontal line.

CHARLES W. WIDMAIER (P38376)

DATED: April 27, 2005